

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1317

September Term, 2017

FILED ON: MARCH 20, 2018

H&M INTERNATIONAL TRANSPORTATION, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

Consolidated with 16-1348

On Petition for Review and Cross-Application
for Enforcement of Orders of
the National Labor Relations Board

Before: TATEL and KATSAS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

J U D G M E N T

The petition for review and the cross-application for enforcement were considered on the record and the briefs and oral arguments of the parties. The court has given the issues full consideration and determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review is **DENIED** and the cross-application for enforcement is **GRANTED**.

The orders on review in this case held that petitioner H & M International Transportation, Inc. engaged in unfair labor practices in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1), (3). *See generally* *H & M Int’l Transp., Inc. (H & M I)*, 363 N.L.R.B. 139 (2016); *H & M Int’l Transp., Inc.*, 363 N.L.R.B. 189 (2016). In its petition for review to this court, H & M argues that (i) the National Labor Relations Board’s actions were invalid because the initial complaint in this matter depended upon the actions of former Acting General Counsel Lafe Solomon, who at the time was serving in violation of the Federal Vacancies Reform Act (FVRA) and (ii) the Board’s decision was not supported by substantial

evidence.

With regard to Solomon — H & M is correct that he was serving in violation of the FVRA when he issued the complaint in this case. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 944 (2017). H & M has forfeited that argument, however. Section 10(e) of the NLRA, 29 U.S.C. § 160(e), deprives this court of jurisdiction to hear an objection that “has not been urged before the Board.” *See Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008). H & M, it is undisputed here, did not make this argument in its exceptions to the administrative law judge’s decision that the Board ultimately affirmed. The Board’s own rules and regulations at the time prescribed that “[n]o matter not included in exceptions ... may thereafter be urged before the Board,” *see* 29 C.F.R. § 102.46(g) (2016). H & M nevertheless contends it did preserve this argument for our review because it raised the argument both in its answer to the initial complaint and in its motion for reconsideration of the Board’s initial decision. An argument made in the answer to the complaint but not renewed in an exception to the decision of the ALJ is forfeit. *Cf. HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016) (noting we lack jurisdiction over any argument not specifically urged before the Board). Raising it anew in a motion for reconsideration, as we held in *Parkwood*, comes “too late” to preserve an issue for our review absent exceptional circumstances, which are not present here. *See Parkwood*, 521 F.3d at 410.

We also conclude that substantial evidence supported the Board’s decision. H & M spills much ink on questions surrounding a surreptitiously recorded conversation between H & M management and union members; it challenges the accuracy and admissibility of the recording. We need not decide those questions because the Board found, and we agree, that substantial evidence supports the ALJ’s finding that H & M engaged in unfair labor practices even absent the recording, *see H & M I*, 363 N.L.R.B. at 168 n.48.

For the reasons stated above, we deny the petition for review and grant the cross-application for enforcement.

Pursuant to D.C. Cir. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk